IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-493

JOHN W. VLANDIS, Director of Admissions, The University of Connecticut, *Appellant*,

v.

MARGARET MARSH KLINE and PATRICIA CATAPANO, *Appellees*

On Appeal from a Three-Judge United States District Court For The District of Connecticut

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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FACTS

The Appellant agrees with the factual material in Appellees' Motion to Affirm under the headings "Question Presented" and "Statement of Case", except that both Appellees were *not* registered to vote in Connecticut at time of trial. Appellees unfortunate assertion that they were registered voters is simply not true.

ARGUMENT

The Appellant's argument has already been outlined in its Jurisdictional Statement. Basically, it is that a lower in-state tuition is a *privilege* granted to certain classes of bona fide residents in the State; that the Legislature may adopt rational criteria for classifying "out-of-state" students, who in turn will be required to pay a higher tuition, but still not the full cost of their education.

In essence, the Appellant is asking the United States Supreme Court to scrutinize the legislative classification adopted by the Connecticut statute measured by the standard of the equal protection clause, i.e., may any state of facts be assumed which would sustain this classification on a reasonable basis? *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). In this connection it is appropriate to consider that while some minor inequities will result from any classification, they must be measured against the administrative and economic advantages that result therefrom. *Bayside Fish Flour Co.* v. *Gentry*, 297 U.S. 422, 429 (1935); *Walters* v. *City of St. Louis*, 347 U.S. 231, 237 (1954). In fact, this Court has already considered and found reasonable a one-year waiting period for a student to attain in-state status. *Starns* v. *Malkerson*, 326 F. Supp. 254 (D. Minn.) (1970) Aff'd Mem. 39 U.S.L.W. 3423 (1971).

The Court below based its decision on the constitutional questions on the conclusion that the statute creates an irrebutable presumption of nonresidency that prevails throughout the students' period of attendance at the University. The Court analogized this to the case of *Carrington* v. *Rash*, 380 U.S. 89 (1965) where the Supreme Court invalidated a section of the Texas Constitution prohibiting Texas-based members of the Armed Forces from acquiring Texas residency for voting purposes while in the military service.

We submit that the Court's reliance of *Carrington* v. *Rash* is misplaced. Nothing is more basic to our constitutional system than the right to vote; this right is protected and guaranteed by the Constitution. The state does not create the right to vote — it must be extended to every citizen.

This is very much different from a tuition differential which requires specifically defined out-of-state students to pay a greater portion of the cost, even though not even the total instructional cost, of their education for the period of their attendance. The out-of-state classification system is designed as a reasonable means to secure state funds and permit a partial cost equalization. From the foregoing, we submit that under the Fourteenth Amendment, legislative bodies are endowed with a wide range of discretion in enacting laws which affect some of the residents differently from others and this constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to achieve a state's objective. *Waggoner* v. *Rosenn*, 286 F. Supp. 275, 277 (1968); *McGowan* v. *Maryland*, 366 U.S. 420 (1961).

While it is our position that the Court's reliance on *Carrington* v. *Rash* is misplaced, unfortunately the trial court's decision in *Kline* v. *Vlandis* has already served as a stimulus to litigation throughout the country. For instance, a three-judge federal court in Colorado, citing *Kline* v.

Vlandis, has declared unconstitutional the tuition criteria at that state's university. The Colorado statute provided for a presumption of continued out-of-state status unless the student took less than eight hours of courses per semester or ceased attendance for a year. *Covell* v. *Douglas, et al,* (No. 25351), ____ F. Supp. ____.

The Colorado Court cited *Kline* v. *Vlandis* and *Robertson* v. *Regents* of the University of New Mexico, (No. 9515), ____ F. Supp. ____, in which a federal court declared the tuition statute of that state unconstitutional.

Similar litigation is also pending in at least Michigan, Oregon and Maryland and most probably in many other states in the near future.

We feel the central issue in all this increasing litigation is the misplaced reliance on *Carrington* v. *Rash* by the trial court in *Kline* v. *Vlandis.* We thus urge that the time is ripe for the United States Supreme Court to provide an authoritative determination of this problem of nationwide significance, and respectfully request that probable jurisdiction should be noted.

Respectfully submitted,

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Appeal From The United States District Court for The District of Connecticut

FILED SEPTEMBER 22, 1972
PROBABLE JURISDICTION NOTED DECEMBER 4, 1972

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APPELLANT'S BRIEF ON THE MERITS

The opinion of the Court below is reported at 346 F. Supp. 438 (1972)

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1343, and a statutory three-judge court was convened to consider appellee's request for an injunction pursuant to 28 U.S.C., Sections 2281 and 2284. The judgment of the District Court was entered on June 22, 1972. Appellant filed notice of appeal with the District Court on June 29, 1972, pursuant to 28 U.S.C. 1253. A copy of the Order and Judgment entered by the District Court and a copy of the Notice of Appeal filed with the District Court are printed as Appendices B & C, respectively of the Jurisdictional Statement.

An application to stay the permanent injunction issued by the District Court was denied on July 15, 1972. An application for a similar stay was then addressed to Mr. Justice Marshall on July 18, 1972 and denied on August 3, 1972. This court noted probable jurisdiction on December 4, 1972.

APPLICABLE LAW

The Connecticut statute which is being questioned by the Appellees in this action is Public Act No. 5 enacted by the June 1971 Special Session of the General Assembly. Section 122 of that Act states as follows:

> ". . . the Board of Trustees of the University of Connecticut shall fix fees for tuition of not less than three hundred fifty dollars for residents of this State and not less than eight hundred fifty dollars for nonresidents . . ."

Section 126 of said Act states that:

> ". . . an 'out-of-state student', if single, means a student whose legal address for any part of the one-year period immediately prior to his application for admission at a constituent unit of the state system of higher education was outside of Connecticut; . . . an 'out-of-state student', if married and living with his spouse, means a student whose legal address at the time of his application for admission to such a unit was outside of Connecticut . . . The status of a student as established at the time of his application for admission at a constituent unit of the state system of higher education under the provisions of this section, shall be his status for the entire period of his attendance at such constituent unit."

QUESTION FOR REVIEW

MAY THE STATE OF CONNECTICUT SEEK TO DEFER A PART OF THE COST OF ITS EDUCATIONAL INSTITUTIONS BY IMPOSING A PERMANENT TUITION DIFFERENTIAL REQUIRING SPECIFICALLY DEFINED OUT-OF-STATE STUDENTS TO PAY A HIGHER PORTION OF THE COST OF THEIR EDUCATION?

STATEMENT OF THE CASE

The Appellee, Margaret Marsh Kline, in May of 1971, while attending California State College at Haywood, as a California resident, applied to the University of Connecticut for admission as an undergraduate student. In June of 1971, the Appellee and Peter Kline intermarried in California and moved to Storrs, Connecticut. Prior to his time in California and also Arizona, Peter Kline had been a resident of Connecticut.

On September 2, 1971 the Appellant Vlandis informed Mrs. Kline that pursuant to Section 10-329(b) of the Connecticut General Statutes, as amended by Public Act No. 5 of the June 1971 Special Session of the General Assembly, she was being classified as an out-of-state student and would be required to pay $425.00 semester tuition as of January, 1972 (resident tuition is $175.00).

Patricia Catapano, in January, 1971, while an undergraduate in Ohio, applied for admission as a graduate student at the University of Connecticut. She was accepted in February, 1971, and moved to Connecticut in August. As with Mrs. Kline, Miss Catapano was classified as an out-of-state student.

Both Appellees now live in Connecticut and have Connecticut-registered motor vehicles and operator's licenses.

However, neither had registered to vote in any Connecticut town as of the date of the hearing, despite representations to the contrary in their trial brief, and in the Opinion of the court below. Tr. p. 42, 43. Appendix p. 22a.

The statutory three judge court found that the Connecticut statute was unconstitutional in that it violates section 1 of the fourteenth amendment to the Constitution of the United States. The court relied primarily on *Carrington* v. *Rash*, 380 U.S. 89 (1965) as authority for the proposition that it is not proper to create such a conclusive presumption of nonresidency as attempted by the statute. The court also found that the statute was so arbitrary and unreasonable that it was not necessary to reach the question of whether it should be analyzed by the Rational Basis or Compelling State Interest tests.

ARGUMENT

Introduction

It should be noted at the outset that this case was neither brought, decided below, tried or appealed in the form of any challenge to the right of the State of Connecticut to impose a higher tuition for nonresident students. Several jurisdictions have already recognized the propriety of such a differential and this Court has affirmed one such determination. *Starns* v. *Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), aff'd without opinion, 401 U.S. 985 (1971). See also *Johns* v. *Redeker*, 406 F.2d 878 (8th Cir.), cert. den. sub nom. *Twist* v. *Redeker*, 396 U.S. 853 (1969). See also *Bryan* v. *Regents of University of California*, 188 Cal. 559, 205 p. 1071 (1922); *Clarke* v. *Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966); *Clarke* v. *Redeker*, 406 F.2d 883 (8th Cir.), cert. den. 396 U.S. 862 (1969); *Kirk* v. *Board of Regents of Univ. of California*, 273 Cal. App. 2d 430, 78 Cal. Rptr. 260 (1st Dist. Ct. App. 1969), app. dism. 396 U.S. 554, 90 S. Ct. 754, 24 L. Ed. 2d 747 (1970);

Thompson v. *Board of Regents of University of Neb.*, 187 Neb. 252, 188 N.W. 2d 840 (1971); *Glusman* v. *Trustees of the University of North Carolina*, 281 N. C. 620, 190 S.E. 2d 221 (1972).

The narrow issue herein presented is then not the existence of the differential, but the propriety of continuing a student's initial classification throughout his attendance at the Connecticut institution of higher education. In this connection, it should be noted that an individual may delay his studies and establish in-state residency for a future application. The classification is thus not truly "permanent."

Relevant Standard of Law: The Rational Basis Test

The District Court declined to specify whether the Rational Basis or Compelling State Interest test was applicable to this tuition situation, stating briefly in a footnote:

> "Since the statute is stigmatized as so arbitrary and unreasonable by its terms as to be unconstitutional, we do not reach the question of whether to test the validity of the "out of state" classification as being 'not merely *rationally related* to a valid public purpose, but *necessary* to the achievement of a *compelling* state interest.' *Eisenstadt* v. *Baird*, 40 U.S.L.W. 4303, 4306 N. 7 (U.S. Mar. 22, 1972)." *Kline* v. *Vlandis*, 346 F. Supp. 438, 443 (1972).

In fact, in the *Eisenstadt* case the court found that the statute satisfied neither test. We submit that failing to utilize either standard, the district court erred. Any approach to this constitutional issue necessitates an initial consideration of a threshhold question, i.e., what standard of law should be utilized in the Court's analysis, the Rational Basis test, or the more stringent Compelling State Interest? We submit that it is the former, and that the basic question of law is

the scope of the equal protection requirement that a state may not treat persons differently unless there is a legitimate difference in their classification, and that any such differential must be rationally related to a legitimate state object or purpose. In sum, the issues are reasonableness of classification and rational means.

An examination of the cases utilizing the Compelling State Interest test indicates that certain distinctive features must be evident; in particular, a statute based upon "suspect criteria," e.g., race, or affect upon a fundamental right. Clearly, the former issue is not raised by the Connecticut statute. The Appellees do assert, however, that the latter element is present in the instant case, citing *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) on the right to interstate travel. In the *Shapiro* case, this Court rejected as unconstitutional Connecticut statutes which denied welfare benefits to individuals who did not satisfy a one-year residency requirement.

Appellees' reliance on *Shapiro* is misplaced, as is apparent in the Court's statement in that case that "We imply no view of the validity of waiting periods or residence requirements determining . . . eligibility for tuition, free education . . . ." *Shapiro* at 638, N. 21. Indeed, the cases of *Starns* v. *Malkerson, Kirk* v. *Board, Thompson* v. *Board,* and *Glusman* v. *Trustees,* cited above, were post *Shapiro* cases which, utilizing a Rational Basis approach, dealt with durational residency requirements, and in which the Courts distinguished the situation from that of welfare payments.

The stated bases for such a distinction were the purposes of the statute, and the degree of possible impact on the plaintiff. *Starns* v. *Malkerson,* 326 F. Supp. 234, 237 (1970). In the *Shapiro* case the Court specifically found that the purpose of the legislature was to deter the immigration

of indigents into the state, i.e., to affect interstate travel. The record in the instant case is devoid of such implication. Indeed, Commissioner Carlson's testimony clearly establishes that the purposes were purely financial. Tr. p. 60, 61 appendix p. 25a, 26a.

The distinction between welfare and tuition is even more pronounced when one considers the relative impact on affected individuals. Many persons in the past have immigrated into Connecticut in search of employment. A denial of welfare possibilities during their first crucial year in the state could clearly discourage their moving in the first place. Prospective students, on the contrary, usually are in the state only for the educational opportunities, and lack anything approaching domiciliary intent. As the court stated in *Starns* v. *Malkerson:*

> "while we fully recognize the value of higher education, we cannot equate its attainment with food, clothing and shelter. *Shapiro* involved the immediate and pressing need for preservation of life and health of persons unable to live without public assistance, and their dependent children . . . . Charging higher tuition fees cannot be equated with granting subsistence to one class of needy residents while denying it to an equally needy class of residents. For the above reasons, we conclude that this is not a case of an infringement of a fundamental right and thus the exacting standards of the compelling state interest have no application. *Starns* v. *Malkerson,* 326 F. Supp. 234, 238 (1970).

The same logic is clearly applicable to the Connecticut situation. The proper test is, as in other tuition cases cited above, the Rational Basis doctrine, i.e., is Connecticut's system of classifying out-of-state students for tuition purposes reasonably related to the legitimate state object or purpose of

securing state funds and permitting a partial cost equalization (out-of-state tuition still falls short of the average instructional cost per student).

This theory of statutory analysis preserves the flexibility of the State legislatures to enact measures designed to meet the particular problems in their own jurisdictions; it is a legal doctrine which wisely recognizes the practical workings of the federal system. Accordingly, state governing bodies are endowed with a wide range of discretion in enacting laws which affect some classes of persons differently from others, and the federal constitutional safeguard is offended only in the most extreme situations.

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . . a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Mayland*, 366 U.S. 420, 425 (1961).

The Fourteenth Amendment does not take the power to classify from the state; nor does it require that a classification be found invalid because it ". . . is not made with mathematical nicety or because, in practice, it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911), *Dandridge* v. *Williams*, 397 U.S. 471 (1970). The basic test is not the existence of isolated instances of some inequalities, but whether any state of facts can be conceived that would sustain the classification. In addition, the existence of such a state of facts should be assumed by the Court. *Morey* v. *Doud*, 354 U.S. 457 (1957); *Lindsley*, supra.

Improper Analogy With Voting Rights

The Appellees and the District Court in the instant case rely on *Carrington* v. *Rash*, 380 U.S. 89 (1965) to support the position that the statutory provision violates the Equal Protection Clause. The Appellees and the District Court contend that the statute creates an irrebutable presumption of nonresidence, and that such a conclusive presumption may not be used to classify a person as a resident when he is, in fact, a resident under *Carrington*, supra.

Carrington was decided not under the Rational Basis test but under the Compelling State Interest test, which we contend is not applicable here. In *Carrington*, the Supreme Court struck down a section of the Texas Constitution which prohibited a member of the armed forces who made a home in Texas during the time of his military service from satisfying the residency classifications for a voter so long as he continued his military service. The Court in that case was dealing with the infringement of the fundamental right to vote and employed the strict standards of the Compelling State Interest test.

> "We deal here with matters close to the course of our constitutional system. 'The right . . . to choose,' *United States* v. *Classic*, 313 U.S. 229, 314 (. . .), that this Court has been so zealous to protect, means, at the least, that States may not casually deprive a class of individuals of the vote because of some remote administrative benefit." *Carrington*, 380 U.S. at 96.

The *Carrington* Doctrine was further refined by the 1968 case of *Kramer* v. *Union Free School District*, 395 U.S. 621 (1968) which clearly established that voting rights cases are in a class by themselves, and that any statute affecting them will be carefully and meticulously scrutinized.

> "This careful examination is necessary because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Kramer*, 395 U.S. at 626.

The Court also clarified the distinction between voting rights statutes and other enactments of state legislatures when it observed that

> "The presumption of constitutionality and the approval given 'Rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people." *Kramer*, 395 U.S. at 628.

We submit a proper reading of these cases demonstrates that Rational Basis is the proper approach to the Connecticut statute.

Application of Rational Basis Test to Tuition Differentials

In the application of the Connecticut statute, it should be noted that the residence requirements at the state university are applied equally to persons in identical classes. All new residents of the state are required to pay a greater portion of the cost, even though not the total instructional cost, of their education for the period of their attendance. It is firmly established that legislation may apply to a particular class if the classification itself is reasonable and founded on some natural intrinsic or constitutional distinction. *Shapiro* v. *Thompson*, (1969), 394 U.S. 618; *Bryan* v. *The Regents of the University of California*, (1922), 188 Cal. 559; *Newman* v. *Graham*, (1960), 82 Ida. 90, 91, 349 P.2d 716.

It is not here suggested that some hardships may not result from this classification, as with all classifications; however, the few inequities that may result are minute in comparison to the administrative and economic advantages that result. *Bayside Fish Flour Company* v. *Gentry,* supra, 297 U.S. 422 (1935); *Walters* v. *City of St. Louis,* 347 U.S. 231 (1954).

Commissioner Carlson outlined in his testimony the financial requirements of the State of Connecticut, with particular attention to the extent of expenditures for higher education generally and for the University of Connecticut in particular. Of special significance is the fact that the average cost of educating a student at the University of Connecticut is over $2,000.00, a sum well in excess of any tuition and fees levied at the institution. The Commissioner presented his expert opinion that a tuition differential for out-of-state students represented a reasonable means to secure state funds and would also permit a partial cost equalization. Tr. p. 60, 61 Appendix p. 25a.

It is the position of the Appellant that the legislative classification of Section 10-329(b) is reasonable. It is based upon the rational assumption that the resident or his parents have supported the State in the past and will continue to do so in the future. In addition, the State's educational facilities are limited, and it is only appropriate that established residents should be favored, since their contribution is more certain.

The Appellees have relied on such post *Shapiro* cases as *Clark* v. *Redeker,* (1969); *Kirk* v. *Board of Regents,* (1969); and *Starns* v. *Malkerson,* (1970). Careful scrutiny of these cases demonstrates that in each instance, the educational institution successfully defended a durational waiting period on the very grounds that the Appellant urges in this cause. Any language beyond that issue is pure dicta.

Since the decision of the District Court in the instant case, courts in at least two other jurisdictions have rendered similar decisions, Colorado in *Covell* v. *Douglas*, ____ Colo. ____ (1972) and New Mexico in *Robertson* v. *Regents*, (No. 9515), ____ F. Supp. ____ (1972). We submit that these cases relied on the trial court's decision in *Kline* v. *Vlandis*, a decision we urge the court to overrule. We are of the opinion that the better view is expressed by two recent cases decided by the Supreme Courts of North Carolina and Nebraska.

The trustees of the University of North Carolina have adopted a regulation with a durational requirement of six months while not in attendance at an institution of higher education. The student plaintiffs relied heavily on *Carrington* v. *Rash* in their demand for reclassification. The Supreme Court of North Carolina quickly disposed of this contention, ruling that:

> "A person's right to eligibility for in-state tuition is quite different from his basic constitutional right to travel freely from one state to another, or his basic constitutional right to vote . . . . We take notice of the stipulation that the regulations in the present case do not impede inter-state travel. Since they do not relate to basic constitutional rights, the regulations are to be tested by the less stringest traditional equal protection standards." *Glusman* v. *Trustees of University of North Carolina*, 281 N. C. 620, 629, 190 S.E. 2d 213, 219 (1972).

The court was also of the opinion that not giving effect to a domicile while attending the university was a reasonable approach to the problem of classification.

> "The State has no obligation to provide educational opportunities to noncitizens. Its interests require that it

> subsidize only those students whom it may be certain are North Carolina citizens. Moreover, uncertainty as to the circumstances under which the tuition status of students may change is fiscally and administratively undesirable . . . That there may be hardship cases resulting from the enforcement of these regulations is also not to say they are unreasonable. The constitutional test is whether the regulations have tended in general to assure that only North Carolina citizens get the benefit of in-state tuition. We hold that they have." *Glusman*, 190 S.E. 2d at 220.

A similar situation occurred in Nebraska where the State legislature set a four-month durational requirement while not in attendance at an institution of higher learning. After analyzing *Shapiro* and *Carrington* v. *Rash* the Supreme Court of Nebraska concluded that the Rational Basis test applied. In applying this test it found that the statutory approach was reasonable.

> "In classifying students for the purpose of charging tuition, the state had the legitimate objective of attempting to achieve a partial cost equalization between those persons who have, and those who have not, recently contributed to the state's economy through employment, tax payments, and expenditures within the state. Such an objective is clearly a "reasonable justification" for the discrimination in tuition." *Thompson* v. *Board of Regents*, 187 Neb. 252, 188 N.W. 2d 840, 843 (1971).

It found further that while there may be hardships in close cases, the state's approach was a rational attempt to handle a difficult problem.

"The Nebraska statute is reasonably designed to protect a legitimate state interest and to secure the bona fides of the claimed intent regarding the residence of a person coming from another state for the avowed and immediate purpose of securing the educational facilities of this state and eschewing the facilities of the state of his prior residence.

"It may be that the statutory standard is occasionally imprecise and imperfect in its application to the relatively unique circumstances of a particular case such as is claimed for the plaintiff here. However, as we have seen, this cannot be used as the basis for striking down the tuition classification here. A state is not required by the equal protection clause to choose between attacking every aspect of a problem or making no effort at all. It is enough if the regulation has a rational basis and does not invidiously discriminate."

Thompson, 188 N.W. 2d at 844.

On its face the "permanent" Connecticut classification system might seem to differ from the durational requirements of North Carolina and Nebraska. Such a conclusion is superficial since there is no prohibition against an individual delaying his attendance at a Connecticut institution, establishing bona fide residence for a year, and then applying for admission as an in-state student. In effect then, the Connecticut statute provides for a one year durational test similar to that of North Carolina and Nebraska.

The adoption of standards such as those used by North Carolina, Nebraska and Connecticut has a further statutory

purpose. Domiciliary intent is often difficult to determine for college students who seldom have set plans for their future homes. Use of durational requirements provides a degree of administrative certainty for both the institution and the student. By fixing a student's residence status in this manner the state insures that its bona fide in-state students will receive their full subsidy. A student who was initially classified as out-of-state should not be granted in-state status by virtue of his having remained in the state in order to enjoy the privilege of state supported education, which he has not supported through taxes. Remaining in the state for purposes of education hardly constitutes an indicia of domiciliary intent.

CONCLUSION

The reported cases indicate the existence of considerable doubt as to the proper application of the Fourteenth Amendment to durational residence requirements necessary to attain in-state status for tuition purposes. It is the appellant's position that judicial analysis should procede by way of the Rational Basis test. It is our further position that application of this test demonstrates that the provisions of the Connecticut statute properly provide a reasonable basis for securing additional state funds and attain a partial equalization of the costs of education.

It is thus our contention that the Connecticut statute is sound not only legally but as a matter of policy. Were the states to be prohibited from such reasonable attempts at fund raising and cost equalization, the result could very well be stringent restrictions on the acceptance of out-of-state applicants. Had such a legally permissible policy been in effect,

neither Mrs. Kline nor Miss Catapano would have been admitted to the University of Connecticut at the time of their application.

In our opinion, the tuition differential is basically a question of educational and financial policy which each state must meet in its own way.

Respectfully submitted,

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